UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD PACKAGING - NIAGARA, A DIVISION OF CASCADES HOLDING US, INC.	:	Case No. 03-CA-242367 03-CA-243854 03-CA-248951
and	:	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 65, AFL-CIO	:	

RESPONDENT'S MOTION FOR RECONSIDERATION OF BOARD'S DECISION AND ORDER REPORTED AT 370 NLRB NO. 76 (FEBRUARY 9, 2021)

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Cascades Containerboard Packaging – Niagara, A Division of Cascades Holdings US, Inc., the Respondent in the above-captioned cases (hereafter, the "Respondent" or "Employer"), hereby submits, by and through the Respondent's Undersigned Counsel, this Motion for Reconsideration of the Decision and Order, 370 NLRB No. 76 (hereafter, the "Board's Decision") issued by the National Labor Relations Board (hereafter, the "Board") on February 9, 2021, whereby the Board affirmed the rulings, findings and conclusions of the Decision (hereafter, the "Judge's Decision") issued by Administrative Law Judge Paul Bogas (hereafter, the "Judge" or "Judge Bogas") on March 17, 2020, and amended the remedy ordered by the Judge.

BACKGROUND

The International Association of Machinists and Aerospace Workers, District Lodge 65, AFL-CIO, the Charging Party (the "Union"), was certified in April of 2019 as the collective bargaining representative of the approximately 115 production and maintenance employees of the Respondent, the operator of a cardboard paper mill located in Niagara Falls, New York. (Tr. 8, 31.) [1]

On May 30, 2019, the Union filed an Unfair Labor Practice Charge with Region Three (the "Region" or "Region Three") of the Board in Case No. 03-CA-242367 (the "First Charge"), alleging that the Respondent had violated §§ 8(a)(1) and (5) of the National Labor Relations Act (the "Act") by unilaterally implementing layoffs without bargaining either the decision or the effects of the layoff with the Union, in retaliation for the Bargaining Unit Employees' election of

[1] General Counsel Exhibits received in the Record by the Judge will be notated "G.C. Ex. __". Respondent Exhibits will be notated "R. Ex. __". Joint Exhibits will be notated "J. Ex. __". References to the transcript of the Hearing before the Judge will be notated "(Tr. __)". References to the parties' Post-Hearing Briefs will be notated "PHB ___." References to the Judge's Decision will be notated "ALJ Decision ___". References to the Respondent's Exceptions will be notated "Exceptions ___". References to the Board's Decision will be notated "NLRB Decision ___".

the Union. G.C. Ex. 1(a). On June 25, 2019, the Union filed a second Unfair Labor Practice Charge with Region Three in Case No. 03-CA-243854 (the "Second Charge"), alleging that the Respondent had violated §§ 8(a)(1), (3), and (5) the Act by unilaterally "altering employees' profit share in retaliation for" choosing to be represented by the Union, and § 8(a)(1) of the Act by virtue of statements purportedly made by Production Supervisor Robert Pozzobon. G.C. Ex. 1(c). On September 27, 2019, the Union filed an additional Unfair Labor Practice Charge with Region Three in Case No. 03-CA-248951 (the "Third Charge"), alleging that the Respondent had violated §§ 8(a)(1), (3) and (5) the Act by refusing to furnish information concerning the Respondent's "profit-sharing system"; ceasing display of the Respondent's "profit sharing formula" at the Employer's facility; and subcontracting work historically performed by bargaining unit employees. G.C. Ex. 1(e). On October 3, 2019, the Union amended its Third Charge to remove the allegation that § 8(a)(3) of the Act had been violated G.C. Ex. 1(g).

On October 30, 2019, the Regional Director for Region Three (the "Regional Director") issued an "Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing" (the "Second Consolidated Complaint"), whereby the First Charge, Second Charge, and Third Charge were consolidated and scheduled for a Hearing on December 3, 2019. [2] G.C. Ex. 1(s). The Second Consolidated Complaint alleged that the Employer had violated § 8(a)(1) of the Act by way of comments allegedly made to employees by Pozzobon [G.C. Ex. 1(s), ¶¶ 6 (a), (b)

[2] On August 6, 2019, the Region issued a "Complaint and Notice of Hearing" in connection with the First Charge, to which the Respondent filed a timely Answer on August 22, 2019. G.C. Exs. 1(i), 1(m). The Complaint and Notice of Hearing did not include the allegation, contained in the First Charge, that the layoffs conducted by the Employer had violated § 8(a)(3) of the Act. G.C. Ex. 1(i). On October 1, 2019, the Region issued an "Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing", consolidating the First Charge and the Second Charge, to which the Respondent filed a timely Answer on October 15, 2019. G.C. Exs. 1(p), 1(r).

and (c) and (10)]; §§ 8(a)(1) and (3) of the Act by discontinuing the posting of "company profit sharing information" [G.C. Ex. 1(s), ¶¶ 8 (a), (f) and (11)]; §§ 8(a)(1) and (5) of the Act by laying off employees in May 2019 [G.C. Ex. 1(s), ¶¶ 8 (b), (c), (g), (h) and (12)]; §§ 8(a)(1) and (5) of the Act by "subcontracting bargaining unit work [G.C. Ex. 1(s), ¶¶ 8 (d), (g), (h) and (12)]; §§ 8(a)(1), (3), and (5) of the Act by "altering" the employee profit sharing plan [G.C. Ex. 1(s), ¶¶ 8 (e), (f), (g), (h), (11) and (12)]; and §§ 8(a)(1) and (5) of the Act by failing to provide the Union with information it had requested concerning profit sharing [G.C. Ex. 1(s), ¶¶ 9 (a), (b) and (c) and (12)]. G.C. Ex. 1(s). On November 12, 2019, the Respondent filed a timely Answer to the Second Consolidated Complaint, which denied the material allegations of the Second Consolidated Complaint. G.C. Ex. 1(u). On December 2, 2019, the Respondent timely filed an Amended Answer to the Second Consolidated Complaint, which again denied the material allegations of the Second Consolidated Complaint and set forth affirmative defenses to the Second Consolidated Complaint.[3] G.C. Ex. 1(x-1). Specifically, the Respondent averred that, *inter alia*: the General Counsel lacked the authority to issue the Second Consolidated Complaint with regard to the profit sharing plan and information request allegations; that the profit sharing and information request allegations and any remedy related thereto conflicted with Canadian law; that the profit sharing plan was a discretionary gift concerning which the Respondent did not have any duty to bargain with the Union; and that the Respondent did not control any "alteration" of the profit sharing plan

[3] On November 18, 2019, the Second Consolidated Complaint was amended to allege that the Union had requested information from the Respondent in writing on or about August 16, 2019, and to attach the Union's written request as an Exhibit to the Second Consolidated Complaint. G.C. Ex. 1(v). The Respondent's December 2, 2019 Amended Answer admitted the additional allegations contained within the amendment. G.C. Ex. 1(x-1).

or the provision of the profit sharing plan, and thus could not have violated the Act. G.C. Ex. 1(x-1).

Thereafter, the Record was opened before Judge Bogas on December 3, 2019, and closed on December 5, 2019. (Tr. 5, 493) The Judge issued his Decision on March 17, 2020, finding that the Respondent had violated §§ 8(a)(1), (3), and (5) of the Act as alleged by the General Counsel in the Second Consolidated Complaint. ALJ Decision 31. On May 4, 2020, the Respondent filed Exceptions to the Judge's Decision, and a Brief in Support of Exceptions (hereafter, the "Exceptions") to the Judge's Decision. On May 18, 2020, the General Counsel filed an Answering Brief to Respondent's Exceptions (the "Answering Brief"), with regard to the limited subject of the remedy ordered by the Judge. On February 9, 2021, the Board issued the Board's Decision, adopting the Judge's rulings, findings and conclusions. NLRB Decision 1. The Board amended the remedy ordered by the Judge, consistent with the Exceptions filed by the General Counsel. NLRB Decision 1-3.

STATEMENT OF THE CASE

I. Background Information

The Respondent operates a cardboard paper mill located in Niagara Falls, New York. (Tr. 8) The Employer's parent company is Cascades, Inc., which is a Canadian corporation that is headquartered in Kingsey Falls, Canada ("Cascades, Inc."). (Tr. 423; 486) Cascades, Inc. is divided into three sectors: tissue, specialty products group (or "SPG") and containerboard. (Tr. 422) The Respondent's mill is part of the containerboard sector, which is comprised of six cardboard paper mills (of which the Respondent is one) and approximately thirty "box plants." (Tr. 422-423) Cascades, Inc. is the entity which administers a profit sharing plan for employees of all three sectors, based upon each sector's profitability in a given period. (Tr. 423) All of the

information about the profit sharing plan is retained by Cascades, Inc. in Quebec, Canada. (Tr. 480-482) Similarly, Cascades, Inc. possesses authority and control over certain of the decisions made by the individual mills within each sector – for example, concerning the publication and availability of sensitive information to employees of the mills. (Tr. 352)

As noted, *supra*, the Union was certified as the collective bargaining representative of the Bargaining Unit Employees in April of 2019. (Tr. 8, 31, 110-111 315.)[4] The Union's organizing drive at the Respondent's facility began in August of 2018. (Tr. 202) After the Union was certified, the parties began negotiating an initial collective bargaining agreement in July 2019, and had met for six or seven bargaining sessions between July 2019 and December 3, 2019, but, as of the time of trial, had not yet reached a collective bargaining agreement. (Tr. 31-32)

II. The June 2019 Profit Sharing Payments

Cascades, Inc. has historically directed the distribution of a "share" of "profits" twice a year, in June and December, to all employees with at least one year of seniority. (Tr. 131, 166, 208, 423) The Employer's two handbooks (one covering Production employees, the other Maintenance) both identify the profit sharing program as a "non-negotiable [...] discretionary corporate program which can be modified or reviewed at any time by the Company." (Tr. 415-416); R. Ex. 8. At the Hearing, General Manager Normand Laporte and Human Resources Manager Joe Zilbauer offered uncontroverted testimony that the profit sharing is a gift from the corporate office that is not guaranteed, and testified that when employees are on-boarded, they are advised that the profit sharing program is a corporate program that the Respondent cannot control, and that it is treated as a gift. Zilbauer testified specifically that profit-sharing "is a gift" and a

[4] The Board certified the Union in Board Case No. 03-RC-238346 on May 6, 2019, as is recorded in the case information found on the Board's website at www.nlrb.gov.

"corporate program" controlled by Cascades, Inc., and that during employee orientation, employees are specifically told not only that it is a gift, but also that **Niagara Falls does not control and cannot guarantee** that employees will receive profit-sharing payments. (Tr. 419, 420-421) Similarly, Laporte testified that profit-sharing was a gift. (Tr. 482) The Respondent plays no role in creating or altering, and does not possess, the formula by which each employee's profit share is calculated, but is instead simply instructed by the corporate office as to the amount of money to provide to each of the Respondent's employees. (Tr. 423-424) The Respondent's singular role with regard to facilitating the profit sharing plan is merely to "validate" that all employees are accounted for in a file received from the corporate office and that their salary information is listed correctly, so as to ensure that every employee on the list provided by the corporate office was employed during the pertinent period so as to be eligible to receive a profit share from the corporate office. (Tr. 425) Specifically, Zilbauer testified that he "didn't have any contribution" to the administration of the profit-sharing plan, the profit-sharing plan design, or the actual distribution of profits under the plan. (Tr. 423) Rather, he explained his limited role as follows: "to validate information in a file **that we received from corporate** [...] to make sure that ... there's no one missing [and] [m]ake sure that no one who should not get profit sharing is in the file." (Tr. 425)

The amount of the profit share payment given to each employee has always varied from one payment to the next, and the percentage of the profit share received has always varied from employee to employee. (Tr. 132, 133, 166) Neither the Union representatives nor any of the employees who testified had any knowledge concerning the specific calculation or formula by which each employee's amount of profit share was, or is now, determined. (Tr. 90, 92, 133, 154, 171, 196) Some of the employees who testified claimed that they could "kind of figure [..] out"

or "ballpark" the amount of profit share they received, estimating based upon what they had received historically and the hours they had worked. (Tr. 138-139, 169, 214) The record does not suggest in any manner that any member of the Respondent's management team possesses or has possessed knowledge of the formula for profit sharing, has authority to make any alteration to the profit sharing formula, or has possessed or possesses any information about either the formula or any changes to the formula.

Ron Warner, a Directing Business Representative of the Union, and some of the bargaining unit employees testified that it was their understanding that the methodology for calculating each employee's profit share had changed twice in the past twenty years - most recently to begin taking into account the profits of some unspecified number of the other mills owned by Cascades, Inc. (Tr. 45, 106, 148, 167-168, 210-212) When those two changes were made, they were announced to employees. (Tr. 168-169, 213) More recently, however, both Warner and Richard Dahn, a Business Representative for the Union, confirmed that the Union had never been advised by the Respondent or Cascades, Inc. that any kind of change had been made to the profit sharing plan insofar as the June, 2019 profit share was concerned. (Tr. 42, 117) Warner admitted that the Union had no firsthand knowledge of whether the Respondent's profits were higher or lower in June 2019 than in previous years, or how employees' profit share amounts compared to the amounts received in prior years. (Tr. 92-93) Similarly, Shawn Reed, an employee with nineteen years of service who testified for the General Counsel, admitted that he had no information about how many of the parent company's other facilities' profits were comingled for the purpose of calculating employees' profit share amounts. (Tr. 240-241) In fact, even Laporte and Zilbauer testified that they are not provided with information about the profits of other mills involved in the

employees' profit share, and exercise no control over the computation of each employees' profit share, or the overall profit sharing formula. (Tr. 382, 423-424, 425-426, 480-481)

Employees Cracknell and Reed, and another employee produced by the General Counsel, Randy Butski, all testified that, in June of 2019, consistent with past practice, Production Supervisor Robert Pozzobon met with them and read to them from a document, the typed text of which mirrored the memorandum provided to all employees. G.C. Exs. 21, 22. The employees claimed that Pozzobon then also read from a handwritten addition to the memorandum, which stated that the profit share in June 2019 was "adjusted" due to the "current conditions" and "current situation" at the Employer's mill. (Tr. 141-142, 175-177, 221) Pozzobon also testified that he told the employees with whom he met that their profit share had been affected by the current situation at the mill – a statement that he read off of a handwritten statement provided to Pozzobon by Pozzobon's Manager, Pat Schamall. (Tr. 287, 288, 290-291). Finally, Pozzobon testified that he always relays to the employees who he meets with to distribute profit sharing that the profit share is a gift. (Tr. 295-296) Butski testified that his June 2019 profit share was "close to the same" as what he had been expecting, and Reed testified that he received roughly 89% of the amount he was expecting, though he claimed that his estimate was limited by the fact he was unable to obtain information about the mill's profits from the whiteboard in Marlowe's office, as he ordinarily had in the past. (Tr. 177, 223)

III. The Union's Requests for Information

On August 16, 2019, Warner, on behalf of the Union, sent the Respondent a request for information concerning the profit share payments made to employees. (Tr. 44-45); G.C. Ex. 4. On August 29, 2020, Zilbauer wrote a letter responding to the request on behalf of the Respondent, stating that, to the extent the Respondent possessed the information requested by the Union, certain

of the information requested was confidential and proprietary; and seeking an explanation of the relevance of the Union's requests. (Tr. 49, 95-96); G.C. Ex. 6. On August 26, 2019, Warner sent the Respondent a second, identical request for information, which was not received by the Respondent until August 29, 2019. (Tr. 48); G.C. Ex. 5. On September 6, 2019, Warner responded to Zilbauer's letter, setting forth the claimed relevance of the information that the Union had requested. (Tr. 51-52); G.C. Ex. 7. The Respondent did not respond to the Union further thereafter, other than through the defense to the Charges, the Petition to Revoke the Administrative Subpoena which was filed contemporaneous with the Union's information requests, and eventually in the Answer to the Second Consolidated Complaint. (Tr. 53)

Warner testified at the Hearing that the Union's information requests were submitted so that the Union could make proposals in bargaining concerning the profit share received by employees. (Tr. 87) However, on September 18, 2019, several weeks after submitting their request for profit sharing information, the Union *actually made* a profit sharing proposal in its first proposal, even though they were not in receipt of the profit sharing information they had requested. Warner and Zilbauer testified, and the documentary evidence confirmed, that the Union's profit sharing proposal was taken word-for-word from the Employer's employee handbooks,[5] including the provisos that the profit sharing program would be non-negotiable and a wholly discretionary corporate program. (Tr. 82, 428); G.C. Ex. 3; R. Ex. 8. Warner testified at the Hearing that the Union's intent in making the proposal was that the Employer would continue administering the

[5] The complete profit sharing text from the employee handbooks constitutes, verbatim, the Union's entire profit sharing proposal, except that the Union added one sentence in its proposal setting forth a requirement not contained in the employee handbooks that "Monthly profit reports will be posted and provided to the Union." See G.C. Ex. 3; R. Ex. 8.

profit sharing program as had been done historically, with the sole addition of providing monthly profit reports to the Union. (Tr. 82-83)

IV. The Posting of Profit Information

During the Hearing, employees testified that, for the last 10 to 15 years, Controller Chris Marlowe had written the Respondent's monthly mill profits on a whiteboard in her office every month. (Tr. 134, 170-171, 215) Employees were permitted to enter her office and observe the mill's monthly profits. (Tr. 134) Cracknell additionally testified that supervisors would also inform employees of the mill's profits, that employees discussed monthly profits internally, and that information about the profits could always be obtained by "word of mouth". (Tr. 134, 135, 138, 154) Butski testified that the mill's profits were last displayed on the whiteboard in February of 2019. (Tr. 174) Reed testified that the profits were last displayed on the whiteboard in May of 2019. (Tr. 218) When Butski and Reed inquired about the whiteboard profits, Marlowe stated that she was no longer allowed to post them, but did not say why. (Tr. 172-173, 218) Cracknell testified that, sometime after the Union election, the mill's profits were no longer written on the whiteboard in Marlowe's office. (Tr. 136) He inquired of Laporte as to why the profits were no longer written on the whiteboard, and was told that, because there was now a third party involved, the Employer could no longer share the numbers. (Tr. 151) Similarly, when Reed asked Laporte why the mill's profits were no longer being displayed on the whiteboard, Laporte responded that the Union had proven they could not be trusted with important information. (Tr. 224) Reed knew that the Union had distributed a flyer with personal information about Laporte, and understood Laporte to be referencing that flyer when they spoke. (Tr. 235)

Specifically, the flyer disseminated by the Union in April of 2019 attacked Laporte, questioning his educational credentials, implying he had falsified his resume, and disclosing his

personal address, information about his personal finances, and the name of his wife. (Tr. 345, 349-351); R. Ex. 6. Laporte testified that the flyer's allegations were untrue, and that he was "very disappointed" by the flyer, and became so sincerely emotional during his testimony about the flyer that the Judge chose to adjourn the Hearing for several minutes to allow Laporte to regain his composure. (Tr. 346-347) Upon his return, Laporte spoke to his acute reaction to talking about the flyer by explaining that, during a prior union organizing campaign at a previous employer, he had personal information about himself disclosed by a union and that, as a result, he, his wife and their children had to be guarded by private security. (Tr. 348) Laporte advised management of the Respondent's corporate parent company, including Luc Pelletier, David Guillemette and Karen Jobin, of the flyer, and shared his concerns. (Tr. 352) In response, the Respondent's parent company instructed the Employer to discontinue the practice of sharing confidential information at the facility. (Tr. 352-354) Thereafter, a memorandum was released on April 29, 2019, expressing, in relevant part, concern with how the Union had "taken sensitive information and used it to put together an adversarial campaign including personal attacks", and advising that, consequently, the Respondent "may not be comfortable to share" "sensitive and private information", "such as profits". (Tr. 352-353); R. Ex. 5.

V. The May 2019 Layoffs

Both Laporte and Zilbauer, testified that, by approximately mid-March of 2019, the Respondent had produced inventory beyond storage capacity and sales for the Respondent were slow, to a point where the Respondent was storing excess product in multiple warehouses. (Tr. 317-321, 398-399, 401) As a result, it became necessary for the Respondent to engage in a temporary, two-week shutdown of one of the two production machines within the plant, from May 20, 2019, through May 31, 2019. (Tr. 124, 205, 330, 399); G.C. Exs. 15-18. All laid-off

employees were returned to work in their former positions on or before May 31, 2019. (Tr. 38) Employees Cracknell, Butski and Reed all testified that such temporary shutdowns of similar scale and for similar, market-driven reasons had occurred in previous years, including in 1997, 2006 and/or 2007, and 2008. [6] (Tr. 130-131, 160-164, 207, 233)

On May 14, 2019, Laporte sent Union Business Representative Rick Dahn an email, with a memorandum attached. (Tr. 111-112, 123, 316, 400); G.C. Ex. 15. The memorandum explained that, due to market conditions and consistent with past practice, some bargaining unit employees would be temporarily laid off over the course of the two-week shutdown, "to begin May 20, 2019." G.C. Ex. 15. Dahn shared the email with Union Business Representative Ronald Warner on May 14 or 15, 2019. (Tr. 32-34) Despite the Union's receipt of the Respondent's notice on May 14, 2019, the Respondent did not receive a response from the Union until May 22, 2019– two days after the start date of the layoff identified in the Respondent's May 14th notice. The Union's response was dated May 17, 2019, but had been sent by regular mail. G.C. Ex. 2. The Union letter received by the Respondent on May 22nd was from Warner to Zilbauer, offering to meet and discuss the layoffs on either May 28, 2019 or May 29, 2019, at the earliest. [7] (Tr. 35-36, 126, 327-328,401-402); G.C. Ex. 2. When Dahn met with Zilbauer and Laporte on May 29, 2019 to discuss another matter, Laporte and Zilbauer asked to discuss the layoffs, and Dahn responded that

[6] Union Business Representative Ronald Warner testified that he had no knowledge of the Respondent conducting prior layoffs and made no effort to determine whether layoffs had been conducted previously, but admitted that an employee had told him that the Respondent had "short shutdowns" in the past. (Tr. 34-35, 75)

[7] When Dahn and Warner were questioned as to why they had waited so long to respond to the Respondent's notice of the layoffs, Dahn responded that he "couldn't [say] exactly why", and Warner testified that he waited to respond until he had access to his letterhead. (Tr. 123, 78) Both Warner and Dahn further admitted that they made no efforts to call either Zilbauer or Laporte after receiving the Respondent's notice of the layoffs to discuss the matter. (Tr. 79, 123-124)

the layoffs could only be discussed with Warner. (Tr. 329, 404); G.C. Ex. 16. Dahn was then informed by Zilbauer and Laporte that all of the employees who had been temporarily laid off would be returned to work by the following Sunday. [8] (Tr. 112-114); G.C. Ex. 16. [9]

VI. Assignment of Custodial Work

Historically, in addition to using an independent contractor for custodial work, the Respondent had employed one Janitor, named Steve Jackson. (Tr. 52-53, 339); G.C. Ex. 8. For at least ten years, Jackson had been primarily responsible for the custodial work associated with the production area of the mill, while the cleaning service was primarily responsible for the Employer's front offices and the completion of major cleaning projects. (Tr. 181, 184, 226, 370, 407, 455-456) The cleaning company also cleaned the production area during Jackson's tenure, at any time when Jackson was otherwise unavailable, or the work required additional crew. (Tr. 369-372, 409-410) Jackson retired in May of 2019, shortly after the Union election, and, thereafter, his position was not immediately filled by the Respondent. (Tr. 57, 339, 368, 408) Instead, the Respondent began to utilize the same independent contractor who had cleaned the front offices to clean the production areas previously assigned to Jackson. (Tr. 57, 66, 227, 339, 373, 409) Laporte and Zilbauer testified that, historically, the Employer had not always filled every vacant position that had arisen, particularly "non-critical function positions", and that, in these particular circumstances, the Employer wished not to fill the vacancy because janitorial work was not the Employer's "core business". (Tr. 342, 408-409, 414)

[8] Warner testified that Zilbauer relayed the same information to him during a telephone call sometime during the first week of June 2019. (Tr. 37-38)

[9] Respondent respectfully requests that the Board take Administrative Judicial Notice that May 29, 2019 was a Wednesday and that June 2, 2019, the following Sunday, was four days later.

On June 4, 2019, Warner sent the Respondent a letter, stating the Union's position that the Respondent was obligated to hire an employee to fill Jackson's position. (Tr. 57); G.C. Ex. 10. The Respondent did not respond to Warner's letter until Laporte and Zilbauer met with Warner on June 10, 2019, on which occasion Warner again shared the Union's view that the Respondent was obligated to fill the vacancy left by Jackson. (Tr. 58-59) Zilbauer responded that he was not sure they were going to fill Jackson's position at that time, and that, even while Jackson had been employed, the Respondent had used the independent contractor as needed to perform janitorial work. (Tr. 103, 411-413); G.C. Ex. 11. Warner again reiterated the Union's position in a letter sent to the Respondent on June 21, 2019, to which the Respondent did not respond. (Tr. 59-60); G.C. Ex. 11. Warner followed up his June 21, 2019 letter with an email to Zilbauer on June 27, 2019, to which Zilbauer responded on July 2, 2019, stating that the Employer intended to post Jackson's position, "with the understanding we need to continue our discussion with the union about the position". (Tr. 60-61, 411-413); G.C. Ex. 12. Thereafter, the Respondent did post Jackson's position, but did not fill it. (Tr. 61-63, 186, 229); G.C. Ex. 20. During the same period of time, the Respondent pursued with the Union the concept of substituting another position for the open Janitor vacancy. (Tr. 342-343, 413-414) Specifically, the Respondent offered to post and fill a vacancy for an Inbound Team Leader, a different bargaining unit position that was actually needed. (Tr. 414-415) The Union never responded with any interest in the Employer's proposals. (Tr. 415)

On September 5, 2019, Warner sent Zilbauer another email, questioning when Jackson's position would be filled. (Tr. 63, 341, 411-413); G.C. Ex. 13. Zilbauer responded to Warner on September 9, 2019, and stated that the Respondent did not have a need to fill the position at that point in time, and was not obligated by past practice to do so. (Tr. 63, 341, 411-413); G.C. Ex.

14. Warner responded to Zilbauer by email on September 13, 2019, reiterating the Union's position, and threatening to file a Charge with the Board. (Tr. 64, 411-413); G.C. Ex. 14. Thereafter, Zilbauer responded to Warner by email on September 23, 2019, requesting that the Union identify any Board precedent that obligated the Respondent to fill the vacancy, and reiterating that the Respondent did not intend to fill the vacancy. G.C. Ex. 19. Warner responded by email the same day, reasserting the Union's position, but failing to identify any applicable precedent. G.C. Ex. 19.

STATEMENT OF SUBSEQUENT PROCEEDINGS

I. The Judge's Decision

After the hearing before the Judge on December 3-5, 2019, the parties submitted Post-Hearing Briefs to the Judge, and on March, 17, 2020, the Judge issued the Judge's Decision. In the Judge's Decision, the Judge first concluded that Respondent supervisor Pozzobon made statements to employees in connection with his distribution of their profit-sharing plan payments that violated § 8(a)(1) of the Act. ALJ Decision 20. The Judge's factual determination that Pozzobon made the statements alleged by the General Counsel served as a necessary lynchpin for the Judge's later findings that "alterations" were made to the profit-sharing plan payments by the Respondent; that those alterations violated the Act; and therefore, that the Respondent's refusal to provide the Union with information about the profit-sharing plan and payments also violated the Act. See, *e.g.,* ALJ Decision 3, 7, 11, 13, 25, 27, 28. In a related vein, the Judge also found that Pozzobon communicated Guillemette's alleged statement to Zilbauer – namely, that profit-sharing payments were changed because of the Union – to employees. ALJ Decision 7.

Next, the Judge determined that adverse inferences against the Respondent were warranted, in light of the fact that the Respondent had not produced certain documents subpoenaed by the

General Counsel. Specifically, the Judge drew an adverse inference that: (1) the profit-sharing payment to unit employees were calculated based, in whole or in part, on the Niagara facility's profits and the other earnings of the particular recipient during the relevant time period (which went to the heart of the Judge's analysis of whether the profit-sharing plan was controlled by the Respondent, and whether the profit-sharing payments constituted a gift); (2) the change made to the operation of the profit-sharing plan in June / July 2019 was substantial (which permitted the Judge to conclude the alleged change violated the Act, and again supported the Judge's finding that the profit-sharing payments were not a gift); and (3) the Respondent was responsible for the change (allowing the Judge to dodge the questions of corporate control raised by the Respondent, and the dearth of evidence presented by the General Counsel on the question of what actual "change" had allegedly occurred). See ALJ Decision 14, 17.

The Judge's conclusion that adverse inferences were appropriate was based upon the Judge's findings that the information subpoenaed by the General Counsel was "properly sought" by the General Counsel, and "highly relevant" to the General Counsel's prosecution of the Second Consolidated Complaint. See ALJ Decision 13, 14, 15 FN 18, 16. The Respondent's arguments against enforcement of the General Counsel's subpoena, including the General Counsel's abuse of authority in pursing the profit sharing allegations in the Second Consolidated Complaint in circumstances where the Union could not and did not present a *prima facie* case that the Act had been violated; the fact that the profit share was a gift concerning which the Union is not entitled to bargain; the compelling conflict of laws issues raised by the Canadian blocking statutes; and the Board's controlling precedent in Electrical Energy Services; and the vague and ambiguous nature of certain of the General Counsel's requests – were dismissed by the Judge as "meritless". ALJ Decision 14. In connection with his dismissal of the Respondent's defenses, and particularly the

Respondent's citation to the Canadian blocking statutes which the Respondent asserted prevented the disclosure of certain documents requested by the General Counsel, the Judge found that the federal law of the United States would not yield to a foreign blocking statute. ALJ Decision 15, FN 18.

The Judge next made three critical findings that formed the foundation of the Judge's conclusion that alleged changes to employees' June 2016 profit-sharing plan payments violated the Act. First, the Judge found that the General Counsel had proven that a change to the profit-sharing plan had even occurred. ALJ Decision 3. Next, the Judge attributed control over the plan and the alleged change to the Respondent, despite uncontroverted record evidence that the profit-sharing plan is wholly controlled by the Respondent's corporate parent without any substantive input from the Respondent. ALJ Decision 6, 27. Finally, the Judge rejected the Respondent's argument that the profit-sharing plan constituted a gift to the Respondent's employees, concerning which the Union was not entitled to bargain. ALJ Decision 26. As a result of these findings, the Judge concluded that the General Counsel had "clearly met" his burden under Wright Line, 251 NLRB 1083 (1980), to show that the Respondent harbored animus against the Union; that the change in question had an adverse effect on employees; and that the Respondent had not rebutted the General Counsel's case. ALJ Decision 27-28.

In a related vein, the Judge concluded that the profit-sharing plan was a term and condition of employment, and as such, the Respondent was obligated to provide the Union with the requested information about the profit-sharing plan. ALJ Decision 31. The Judge also found that the Respondent violated § 8(a)(3) of the Act by ceasing to post the facility's profits at the facility. ALJ Decision 28. First, the Judge found that the Respondent, rather than Cascades, Inc., made the determination that the facility would stop posting profits. ALJ Decision 10. Next, the Judge found

that the General Counsel met its burden to establish animus on the part of the Respondent and rejected the Respondent's arguments that the decision to stop sharing the facility's profits was made on the basis of the Union's personal attack on Laporte. ALJ Decision 28, 29.

Finally, the Judge found that the Respondent violated the Act by failing to provide notice and an opportunity to bargain to the Union before conducting temporary layoffs in May 2019, and by using an independent contractor to clean the mill after Jackson retired, without first providing the Union notice and an opportunity to bargain. ALJ Decision 23, 25. With regard to the layoffs, the Judge found that the Respondent presented the Union with a *fait accompli;* or alternatively, that the Respondent's notice to the Union was insufficient. ALJ Decision 23. The Judge rejected the Respondent's assertion that the Union had waived its right to bargain over the temporary layoffs by failing to respond to the Respondent in a timely manner, and also rejected the Respondent's argument that the Union waived its right to bargain over the layoffs when it did not respond to the Respondent's letter in a timely fashion and failed to make itself available until well after the planned layoffs were tentatively scheduled to be conducted. ALJ Decision 4, 21, 22 (FN 23). With regard to Jackson's retirement, the Judge rejected the Respondent's claim that the Respondent had a past practice of utilizing subcontractors, as well as the Respondent's argument that the Respondent had no obligation to bargain over the decision to use subcontractors pursuant to First Nat. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). ALJ Decision 18, 24.

II. The Respondent's Exceptions

In response to the Judge's Decision, the Respondent filed Exceptions with the Board on May 4, 2020. In the Respondent's Exceptions, the Respondent raised objections concerning virtually each facet of the Judge's Decision. First, the Respondent argued that the Judge's factual findings concerning the statements allegedly made by Pozzobon were not supported by the

evidentiary record, and therefore, had to be reversed. Exceptions 16-18. The Respondent also argued that the Judge did not contend with the fact that his analysis holds the *Respondent* responsible for allegedly relaying statements concerning actions allegedly taken by an *entirely separate* legal entity with whom neither a joint or single employer relationship is alleged. Exceptions 17.

Next, the Respondent argued that the Judge had erred by imposing sanctions, including the drawing of adverse inferences, against the Respondent. Exceptions 19-27. The Respondent argued that the Judge had incorrectly analyzed the General Counsel's subpoena; Board precedent; and the Respondent's arguments, including the General Counsel's abuse of authority in pursing the profit sharing allegations in the Second Consolidated Complaint in circumstances where the Union could not and did not present a *prima facie* case that the Act had been violated; the fact that the profit share was a gift concerning which the Union is not entitled to bargain; the compelling conflict of laws issues raised by the Canadian blocking statutes; and the Board's controlling precedent in Electrical Energy Services; the Respondent's lack of possession of and access to the subpoenaed information; and the vague and ambiguous nature of certain of the General Counsel's requests. Id.

The Respondent's Exceptions next argued that the Judge erred by: finding that the General Counsel had proven that a change to the profit-sharing plan had even occurred; wrongfully attributing control over the plan and the alleged change to the Respondent, despite uncontroverted record evidence that the profit-sharing plan is wholly controlled by the Respondent's corporate parent without any substantive input from the Respondent; and by failing to find that the profit-sharing plan constituted a gift to the Respondent's employees, concerning which the Union was not entitled to bargain. Exceptions 27-38.

The Respondent next asserted that the Judge's finding that the alleged changes to the profit-sharing plan were made in violation of §8(a)(3) of the Act was incorrect, because the Judge had erred in finding that the General Counsel had met, and the Respondent had not rebutted, the General Counsel's burden pursuant to Wright Line. Exceptions 39-41. The Respondent also addressed the Judge's finding that the Respondent violated the Act by failing to respond to the Union's request for information regarding the profit-sharing plan and profit-sharing plan payments, pointing out that the profit-sharing plan was not a term and condition of employment, and furthermore, that the Judge had neglected to address the Respondent's arguments that the Union's requests were not relevant, because the Union was able to proceed in bargaining and make a proposal regarding the profit-sharing plan without the requested information. Exceptions 41. Finally, the Respondent argued that the Judge's conclusion that the Respondent had violated §8(a)(3) of the Act by ceasing to post facility profits at the mill was erroneous, as it was not founded upon the evidentiary record. Exceptions 41-45.

The Respondent's Exceptions also challenged the Judge's findings regarding the layoffs and the subcontracting of janitorial work. With regard to both the layoffs and the subcontracting, the Respondent argued that the Judge's findings and conclusions were equally unsupported by the record and by precedent. Exceptions 45-50.

III. The Board's Decision

On February 9, 2021, the Board issued its Decision. The Board determined that it would not reverse *any* of the Judge's credibility findings, and that "careful examination of the judge's decision and the entire record" had satisfied the Board that the Judge had not demonstrated bias or prejudice toward the Respondent. NLRB Decision 1, FN 1. The Board's Decision did not substantively address the Respondent's arguments concerning the Judge's finding that Respondent

had made statements violative of § 8(a)(1) of the Act. Nor did the Board's Decision address with any particularity the Judge's decision to draw adverse inferences against the Respondent, or any of the Respondent's arguments refuting the propriety of the Judge having drawn those adverse inferences. With regard to the profit-sharing plan, the Board did not address the Respondent's defenses to the claim that § 8(a)(1) and (5) of the Act had been violated – the Board did not analyze the Respondent's arguments concerning the lack of evidence concerning the alleged change itself, the Respondent's lack of control over the profit-sharing plan, nor the Respondent's arguments that the profits shared with employees were a gift.

The Board did somewhat more squarely address the allegation that Respondent had violated §8(a)(3) and (1) of the Act by "reducing employees' profit-sharing plan payments", finding that § 8(a)(3) and (1) of the Act were violated, but that the Judge had erred in applying the Wright Line analysis. NLRB Decision 1, FN 1. Specifically, the Board held that Wright Line was not applicable to the instant case because motive, according to the Board, was "not disputed" but rather was proven by "direct evidence establish[ing] that the Respondent reduced the payments because of 'the union situation'". Id. The Board further claimed that the Respondent had failed to state any other reason for "the reduction". Id. However, the Board did not address the Respondent's arguments rebutting the Judge's finding that its failure to provide information to the Union about profit-sharing was unlawful, nor did the Board appear to consider any of the arguments raised by the Respondent related to the Judge's finding that the Respondent had violated § 8(a)(3) of the Act when it ceased posting facility profits at the plant.

Next, the Board affirmed the Judge's determination that the Respondent had presented the layoffs to the Union as *fait accompli*, relying upon the "totality of the circumstances", but also the fact that the Respondent had proceeded with a second round of layoffs after receiving the Union's

demand to bargain. Id. However, the Board noted that it "did not pass" on whether the layoff notice provided to the Union, standing alone, would be sufficient to establish that the layoff was *fait accompli.* Id. The Board additionally opined that, under different circumstances, six days' notice of the layoffs might have been sufficient, but was insufficient in this case because the Union was "recently certified" and the Union had to take measures to determine whether the layoff constituted a past practice. Id. The Board's Decision made no effort to contend with either the Respondent's factual or legal arguments concerning its decision to subcontract the janitorial work previously performed by Jackson.

Thus, aside from this shockingly brief and incomplete analysis, the Board's Decision was silent with regard to the vast majority of the Respondent's Exceptions, arguments and defenses, and summarily affirmed most of the Judge's rulings, findings, and conclusions.[10] NLRB Decision 1.

ARGUMENT

I. Summary of Argument

The Board's failure to address almost all of the arguments raised by the Respondent's Exceptions requires the Board to reconsider its Decision in this case. On those few subjects where the Board provided further reasoning in support of the Judge's Decision, the Board's reasoning must fail, and is therefore equally meritorious of reconsideration by the Board. First, the Board wholly failed to consider the arguments raised by Respondent concerning statements allegedly made by Pozzobon, which serve as the lynchpin for many of the Judge's later factual findings and legal conclusions. Second, the Board did not analyze any of the many compelling arguments made

[10] The Board also amended the remedy ordered by the Judge to require the Respondent to furnish appropriate W-2 forms to the Regional Director of Region Three of the Board, and therefore modified the Judge's Order and notice. NLRB Decision, 2 FN 2, 4, 5.

by the Respondent concerning the adverse inferences that were improperly drawn by the Judge. The Board next failed by affirming the Judge's faulty and incredibly problematic rulings regarding changes to and control over the profit-sharing plan – some of which destine the instant case for a long and litigious future before the Board and Courts, through no fault of the Respondent. As a related matter, the Board did not so much as address the Respondent's argument that the profit-sharing payments to employees constituted a gift.

The Board also erred by finding that the alleged alterations to the profit-sharing plan violated §8(a)(3) of the Act, and that the Respondent was compelled to share information about profit-sharing with the Union. Furthermore, neither the record nor the Board's precedent supported its affirmation of the Judge's finding that the Respondent violated the Act when it was determined that facility profit information would no longer be posted at the facility. Finally, the Board's clarifications to the Judge's Decision on the subject of layoffs, and the Board's failure to analyze the Respondent's arguments concerning the subcontracting of janitorial, both additionally merit reconsideration of the Board's Decision. For all these reasons, the Board should reconsider its Decision, and reverse the Judge's Decision, in the instant case.

II. The Board Erred by Accepting Without Analysis the Judge's Finding that the Respondent Made Statements in Violation of § 8(a)(1) of the Act

The Board's blanket adoption of the Judge's factual findings, without any more particularized or specific analysis, fails to consider the compelling arguments made by the Respondent concerning the statements allegedly made by supervisor Pozzobon. Consideration of these specific factual findings is particularly important, as these factual findings form the underpinning of many of the Judge's later findings and credibility determinations, and these factual findings are wholly unsupported by the record.

The Respondent urges that the Board undertake a more detailed review of the record with regard to the statements allegedly made by Pozzobon. When reviewed objectively, the record simply does not support the conclusion that Pozzobon made the statements that the General Counsel has alleged. The Judge found that Pozzobon, during meetings that were consistent with the Respondent's past practice, told Cracknell that his profit-sharing payment was being "adjusted" due to the "situation" with the "Union". ALJ Decision 7. In fact, the record shows that, upon review of his affidavit, Cracknell admitted during his testimony that Pozzobon referenced the Union "in a roundabout way" and may not have even used the word "union" at all during their discussion. (Tr. 141-142, 155-156) A review of the record also illustrates that Pozzobon's alleged reference to the "current situation" at the mill was a reference to the soft market and the temporary layoffs that the mill had so recently endured - in other words, a simple explanation that profits were down (which, coincidentally, would also explain Pozzobon's reference to an "adjustment" associated with lower mill profits). Similarly, the Judge found that Pozzobon told Butski that profit-sharing payments were "reduced" "because of the Union", when the record demonstrates that Pozzobon credibly denied stating in *any* employee meeting concerning profit-sharing plan payments that payments had been adjusted because of the Union. (Tr. 287) This record evidence is directly contrary to the Judge's findings that Pozzobon did not deny making a statement about the Union to Butski, and thus the Judge's finding that Butski's testimony was "uncontradicted". ALJ Decision 7-8, FN 9. Given these clear contradictions, it does not appear that the Board gave sufficient attention to the record in affirming the Judge's Decision in this regard, and therefore the Respondent respectfully requests that the Board reconsider its Decision and Order.

Furthermore, the Board did not consider or respond in any way to the Respondent's argument that the Judge's analysis holds the *Respondent* responsible for allegedly relaying

statements concerning actions allegedly taken by an *entirely separate* legal entity with whom neither a joint or single employer relationship is alleged - a proposition in support of which the Judge's Decision cites absolutely no legal authority, and concerning which the Board shared no further insight. Because this issue is a constant, unresolved theme that runs throughout the instant case, the Respondent urges that it merits the full attention of and detailed analysis by the Board.

III. The Board Failed Wholesale to Consider the Impropriety of the Adverse Inferences Drawn by the Judge

The Board failed to provide any additional analysis whatsoever of the Judge's wrongful imposition of sanctions, in the form of adverse inferences, on the Respondent, by way of his drawing of adverse inferences against the Respondent.[11] The Board did not contend with Respondent's arguments against enforcement of the General Counsel's subpoena, including the General Counsel's abuse of authority in pursing the profit sharing allegations in the Second Consolidated Complaint in circumstances where the Union could not and did not present a *prima facie* case that the Act had been violated; the fact that the profit share was a gift concerning which the Union is not entitled to bargain; the compelling conflict of laws issues raised by the Canadian blocking statutes; and the Board's controlling precedent in Electrical Energy Services; and the vague and ambiguous nature of certain of the General Counsel's requests, all of which were simply dismissed by the Judge as "meritless". [12] The Board must address the Respondent's arguments

[11] The Board also failed reconcile the fact that some of the Circuit Courts question whether the Board possesses the authority to impose sanctions at all, where Congress explicitly reserved the authority to enforce the Board's subpoenas to the Federal Courts. See NLRB v. Int'l. Medication Systems, 640 F.2d 1110 (9th Cir. 1981). On the basis of those Courts' decisions, the Respondent submitted to the Board that the Judge was without authority to impose sanctions in the instant case – an argument that the Board has not answered.

[12] See R. Ex. 1, pp. 21-22 and 24-25.

concerning the Judge's adverse inferences, the Judge's adverse inferences must be struck, and the Judge's many findings resting upon those adverse inferences must be reversed.

In particular, the Board's failure to address Electrical Energy Services is concerning. As the Respondent argued in its Exceptions, there is no Board precedent that supports the Judge's distinction of Electrical Energy Services on the single, solitary basis that the requests for the profit sharing information were not the only trial issue. See ALJ Decision 14, FN 17. The facts in the instant case are identical in every material respect to those presented by Electrical Energy Services – namely, virtually every item of information sought by the Union in its request for information submitted during bargaining is encompassed by the General Counsel's subpoena. See G.C. Exs. 4, 5; R. Ex. 1, Att. A. Furthermore, there is no support in Electrical Energy Services or any other case for the Judge's proposition that the Board's holding was limited to only those cases where failure to respond to the union's request for information was the only alleged unfair labor practice. See Decision 14, FN 17. Indeed, by way of the Judge's reasoning, it is only the Region's consolidation of the cases which rendered the General Counsel's subpoena enforceable – surely not the result intended by the Board in Electrical Energy Services. Thus, for all these reasons, the Board must consider and account for this precedent when reviewing and determining whether to the Judge's Decision. Because it has not, the Respondent's Motion for Reconsideration should be granted.

Similarly, the Board's Decision does not contend in any way whatsoever with the complicated conflict of laws and jurisdictional issues that arise as a result of the application of the Quebec Business Concerns Record Act and the Ontario Business Records Protection Act – the pair of Canadian blocking statutes cited throughout these proceedings by the Respondent. Quebec Business Concerns Records Act, CQLR, Ch. D-12; Ontario Business Records Protection Act, RSO

1990, Ch. B.19. These blocking statutes prevent the disclosure or transfer of "any document" or "any material" to any place outside of those provinces upon a requirement (including a subpoena) issued by a foreign authority, including an "administrative authority." CQLR, Ch. D-12, §2; RSO 1990, Ch. B.19, §1. As set out in the statutory provisions, failure to comply with the requirements of these laws can ultimately subject a party to a finding of contempt and, in the case of the Ontario statute, imprisonment. CQLR, Ch. D-12, §5; RSO 1990, Ch. B.19, §§2, 3.

The Judge's argument dismissing the Respondent's well-founded concerns about the applicability of these laws to the instant rested primarily on his citation to Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 544 FN 29 (1987) for the proposition that the federal law of the United States would not yield to a foreign blocking statute. Decision 15, FN 18. However, the Board, like the Judge, failed to recognize that Aerospatiale is relevant to the analysis of the blocking statutes at issue in the instant case for the purposes of providing the framework to analyze whether the statutes would, before a United States tribunal, serve to block the production of certain documents. See Aerospatiale at 543-544 (citing to the standard for, and need to apply, international comity). Aerospatiale does not function as a complete bar to the application of a foreign blocking statute. This fact is illustrated not only by Aerospatiale itself, but also the cases cited by the Respondent – and apparently ignored by the Board - in which United States courts held, pursuant to analysis which accounted for Aerospatiale, that a foreign blocking statute prevented the production or disclosure of certain documents. See Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2015); Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517 (S.D.N.Y. 1987); Tiffany LLC v. Qi Andrew, 276 F.R.D. 143 (S.D.N.Y. 2011), *cited by* R. PHB 48. Thus, the Board failed to contend with the fact that enforcement of the General Counsel's subpoenas was not, therefore, a simple question of

federal precedence; but instead, a much more complicated analysis of international comity, which both the Board and the Judge were required, and have failed, to undertake.

The Board also failed to correct clear factual errors in the Judge's Decision related to his drawing of adverse inferences against the Respondent. First, in determining that sanctions were warranted, the Judge claimed that the Respondent had continued to refuse to produce information after he had denied the Respondent's Petition to Revoke the General Counsel's subpoena [13], and characterized the Respondent's refusal to produce documents as "contumacious". ALJ Decision 13, 14. To the contrary, immediately after receiving the Judge's ruling on its Petition to Revoke, the Respondent began producing documents responsive to the General Counsel's subpoena on the first day of hearing. See (Tr. 16) The only documents not produced on the first day of hearing were the documents the Respondent did not possess, or which implicated the questions of foreign law raised by the Canadian blocking statutes.[14] Thus, it is clear that the Judge's findings were

[13] As the Respondent pointed out in its Exceptions, without response from the Board, if any misstep was made *vis a vis* timing, it was committed by the Judge, who, somewhat tellingly, began discussing the imposition of sanctions upon the Respondent with the General Counsel before even having ruled on the Respondent's Petition to Revoke (rather than after the Respondent refused production as he claimed in his Decision). See (Tr. 14-16); ALJ Decision 13-14. In this regard, the Judge was considering sanctions for a failure to respond to the General Counsel's subpoena before even ruling upon the Respondent's Petition to Revoke, let alone resolving what steps the Respondent had already taken or would be taking to respond. The Board's Decision, despite claiming to have reviewed the record carefully for bias, neither recognizes or addresses this blatantly improper action on the part of the Judge.

[14] As a related matter, both the Board's Decision and the Judge's Decision failed to address the Respondent's assertion that the General Counsel bore the burden to establish that the Employer was in possession of the information that the General Counsel had subpoenaed – a necessary underpinning to the imposition of sanctions. See Dish Network Corp., 359 NLRB No. 108, 10 FN 31 (2013); North Hills Office Services, 344 NLRB 1083, 1084 FN 13 (2005); Shamrock Foods Co., 366 NLRB No. 117, 1 FN 1 (2018).

unsupported by the evidentiary record, and should have been addressed and overturned by the Board's Decision. [15]

Next, the Board's Decision failed to address the complicated issue of Respondent's possession of certain subpoenaed documents. The Employer advised, from the very outset in response to the Union's request for information and General Counsel's subpoenas, that the pertinent documents concerning profit-sharing might be outside of the Respondent's possession. See G.C. Ex. 6 (Response to Union request for information); R. Ex. 1 (Respondent's Petition to Revoke); G.C. Ex. 1(x-2) (Respondent's Amended Answer); (Tr. 23) ("I will advise Your Honor and Counsel for the General Counsel and the Union that we do not possess or control possession of the information that is being sought by the subpoena that was issued by the General Counsel."). Furthermore, contrary to the Judge's assertion, both Laporte and Zilbauer offered credible, unrebutted testimony that the Respondent did not possess information about the profit-sharing plan or formula. See Tr. 382, 421-426, 480-481. These clear facts were ignored by the Judge's Decision, and the Respondent's arguments on this subject were in no way addressed by the Board's Decision.

Furthermore, the Board failed to properly examine the Judge's finding that Respondent was obligated to make efforts to obtain responsive documents from Cascades, Inc., and perhaps other, separate subsidiary corporate entities. See ALJ Decision 16. In this manner, the Board's Decision ignores not only the issues related to the blocking statutes, but rests upon the faulty

[15] Relatedly, the Board failed to contend with its own requirement that the imposition of sanctions is only appropriate where a preliminary showing of prejudice has been made. See Sisters Camelot, 363 NLRB No. 13, 12 (2015); Addressograph-Multigraph Corp., 207 NLRB 892, 892 FN 2 (1973). In the case at bar, the record illustrates that, by the end of the hearing, the General Counsel made no claim of prejudice. The General Counsel's arguments for sanctions in his Post-Hearing Brief similarly do not claim prejudice. See G.C. PHB 28-29. Accordingly, the Judge lacked a basis upon which to lawfully impose sanctions.

citations of the Judge in his underlying Decision. The Judge's assertion that the Respondent was required to obtain information from "other persons or companies" (ALJ Decision 16) is based upon Clear Channel Outdoor, Inc., 346 NLRB 696 (2006) and Winthrop Management, 2018 WL 834316, but fails to recognize that both cases, the Board held only that the respondents were obligated to produce all documents *they had a legal right to obtain.* In the case at bar, for the reasons explained herein, the Respondent has demonstrated that it has no legal right to obtain documents from Cascades, Inc. or any other entity, given not only the application of the Canadian blocking statutes at issue, but also, the total lack of evidence presented by the General Counsel of a relationship between the entities that would establish or permit such a right on the part of the Respondent. The Board's Decision is inappropriately and improperly silent as to all of these arguments, and therefore must be reconsidered.

IV. The Board Did Not Consider or Address the Respondent's Arguments Concerning the Profit-Sharing Plan and Alleged Violation of § 8(a)(5) and (1)

In connection with the profit-sharing change allegations, the Board did not substantively address, let alone correct, any of the Judge's notable errors. First, the Board failed to address the General Counsel's failure to prove that a change to the profit-sharing plan had even occurred, as raised by the Respondent. Next, the Board silently affirmed the Judge's wrongful attribution of control over the plan and the alleged change to the Respondent, despite uncontroverted record evidence that the profit-sharing plan is wholly controlled by the Respondent's corporate parent without any substantive input from the Respondent. Finally, the Board erred by failing to address on its merits the Respondent's assertion that the profit-sharing plan constituted a gift to the Respondent's employees, concerning which the Union was not entitled to bargain. Accordingly, given the Board's universal failure to consider these allegations in the Board's Decision and Order,

the Board should grant the Respondent's Motion and undertake meaningful consideration of all the Respondent's arguments now, while the case is still pending before the Board.

a. The Board Fails to Acknowledge That the Record Contains No Evidence of the Alleged Alteration

The Board's Decision does not address the fact that the General Counsel completely failed to prove an alleged change to the profit-sharing plan payments to employees. Indeed, *the Judge himself admitted* in the Judge's Decision that "[t]he record evidence does not establish exactly how much the profit-sharing plan's operation was changed." ALJ Decision 13. The record not only fails to establish "how much the profit-sharing plan's operation was changed", but additionally the record contains *nothing* about the elements of the profit-sharing plan, other than the well-intentioned, but wholly insufficient, perceptions and conjectures of several employees called as witnesses by the General Counsel. In point of fact, all the General Counsel managed to establish was that the employees called by the General Counsel *believed* that the amount of the profit share payment that each employee received in June of 2019 had varied from the amount of the profit share payment that each employee received in the past. This "change", however, is entirely to be expected, given the testimony of every witness that the amount of an employee's *profit* share will turn on the amount of *profit* – which, as the General Counsel admitted (Tr. 10), will vary for every six-month period, and has historically been wide-ranging. [16] The Board did not address these

[16] The Judge's Decision puts much credence in employees' testimony that they estimated their payments were roughly $1,000 less than they expected. See ALJ Decision 8, 13, 28, 25. The record illustrates that there is no reason to believe that employees' "guesstimates" were in any way accurate. In fact, Reed admitted that he did not have (and never did have) information about either the Employer's profits, or the profits of other mills, to calculate an accurate estimate (Tr. 177, 213), and Butski admitted that his June 2019 profit share was, in fact, "close to the same" as what he had been expecting. (Tr. 177) Even if the Judge's finding were accurate, the record does not support the Judge's repeated characterization of the change as "substantial" (ALJ Decision 25) where, by the Judge's own calculation, the change was, on average, less than a 10% difference from the prior payment. See ALJ Decision 6, FN 7.

arguments, which are raised equally by the Respondent's Exceptions and the Respondent's Motion to Dismiss.

The Judge additionally included many factual findings in his analysis that were unsupported, if not outright contradicted, by the underlying record, which also were not addressed by the Board's Decision. For example, the Judge claims that the process for calculating profit-sharing payments was changed (ALJ Decision 7), despite a total lack evidentiary support for this assertion. The Judge's Decision further claimed that the formula for the profit-sharing plan payments was based on facility profits and "other compensation the Respondent paid to the employee during the relevant period". ALJ Decision 6. The record, which includes no information about the formula underlying profit-sharing payments, does not support this finding. For similar reasons, the record does not support the Judge's claim that the payments were calculated dividing up the facility's profits amongst employees based upon their earnings. ALJ Decision 6. There is simply no credible record evidence to support the Judge's finding; and in fact, the record illustrates that even employees and the Union admitted that the formula took into account some unknown portion of the profits of other facilities owned by the same corporate parent. See (Tr. 45, 106, 148, 167-168, 210-212) [17] Finally, the Judge claimed that Zilbauer "knew about a change" to the plan based on his conversation with Guillemette (ALJ Decision 13), despite the fact that Zilbauer's testimony, as explained above, was far too vague and ambiguous

[17] This evidence renders the Judge's finding that the profit-sharing payments had been reduced on two prior occasions (Decision 6) equally inaccurate – what the record actually shows is that two prior alterations were made to profit-sharing in part to account for the profits of other mills into the formula utilized by Cascades, Inc. to determine payment amounts, well before the Union was certified.

to support this conclusion. These many statements in contradiction to the evidentiary record should have been addressed by the Board in its Decision and Order, and were not.

Furthermore, because the record did not support that a substantive change to the profit-sharing plan was made, the Judge leaned heavily on his § 8(a)(1) findings and his drawing of an adverse inference in order to prop up the General Counsel's case – a fact that the Board did not seem to recognize, or alternatively, did not submit to much scrutiny. See ALJ Decision 11, 12, 25. As explained above, the Judge's findings concerning Pozzobon's alleged statements to employees, and the rationale for his decision to draw adverse inferences against the Respondent, should both have been rejected by the Board. As a result, the Judge's finding that a change was effectuated to the profit-sharing plan should also have been overturned, as those flawed findings formed its foundation. Consequently, it is clear that the Judge's finding of a change to the profit-sharing plan should have been vacated, and the Respondent urges the Board to take such action upon reconsideration of its Decision and Order.

b. The Board and the Judge Ignored Critical Evidence of the Respondent's Lack of Control

The Board also failed to address the totally erroneous finding that the Respondent controlled, and was thus responsible for, the amount of the profit-sharing payments that employees received in June 2019, despite a mountain of record evidence to the contrary. This failure was critical, and in and of itself, standing alone, warrants the Board's substantive consideration upon reconsideration of the Board's Decision. Despite the Respondent having repeatedly joined the issue of what legal entity actually had control over the profit-sharing plan which is the subject of the Second Consolidated Complaint and Decision, the General Counsel, who had the burden to establish which entity was responsible for the alleged wrongdoing, never even attempted to prove that it was the Respondent. The record, including the uncontroverted testimony of Zilbauer and

Laporte, illustrated that Cascades, Inc. possessed sole control over the profit-sharing plan, the formula for profit sharing, any changes made to the profit-sharing plan, and virtually all of the information concerning how profit shares are established and calculated. [18] See (Tr. 382, 423-424, 425-426, 465-466, 480-481)

The General Counsel had the burden to establish that the Respondent **possessed control** of the profit-sharing plan and thus **was responsible** for any "changes" to the profit-sharing plan, such that the Respondent would have the ability to remedy the alleged unlawful "changes" to the profit-sharing plan, and failed to meet that burden. Unfortunately, the Judge effectively shifted the burden to the Respondent to establish, instead, that the Respondent was **not** responsible for any "changes" to the profit-sharing plan because the Respondent **lacked control** over the profit-sharing plan. Despite this inappropriate shifting of the burden, the preponderance of the evidence in the Record as a whole still served to establish that the Respondent lacked **any** control over the profit-sharing plan and that, to the contrary, the Respondent's responsibilities via-a-vis the profit-sharing plan were two-fold and ministerial: (1) Checking the names of employees provided to the Respondent by Cascades, Inc., its Canadian corporate parent, to verify that no name on the list was that of an employee who, for instance, had quit or been terminated, and (2) Handing out the profit-

[18] The Judge's Decision, uncorrected by the Board's Decision, observed that, "For over 20 years, the *Respondent* has made semi-annual profit-sharing plan payments to employees at the Niagara facility." (ALJ Decision 6)(emphasis added) This quote illustrates the Judge's regular conflation of the Respondent with Cascades, Inc. - while it is true that employees at the Niagara Falls Mill have been the recipients of profit-sharing payments for over twenty years, the record clearly establishes the payments were decided upon by Cascades, Inc. This repeated error reveals the Judge's lack of comprehension as to who was being prosecuted, and what the record developed before him contained (and did not contain) as concerns the "profit-sharing plan." See Also ALJ Decision 8 (Wherein the Judge perpetuates an omnipresent confusion between the Niagara facility (the mill in Niagara Falls that doesn't own "other facilities") as the Respondent identified in the Second Consolidated Complaint, and the entity actually in control of the profit-sharing plan.).

sharing distribution (the amount of which was solely determined by Respondent's parent) to the employees working at the Respondent's location in the form of, for instance, a check.

In concert, therefore, the actions of the General Counsel and the Judge had the effect of foisting onto the Respondent a burden of proof which properly rested with the General Counsel: The Judge and the Board should have tasked the General Counsel with proving the Respondent's control over profit-sharing, but instead saddled the Respondent with the burden of proving that it did *not* control profit-sharing. Given this error, and additionally because a review of the substantial record evidence amply demonstrates that that the Respondent was not liable for administration of, or changes to, the profit-sharing plan,[19] the Judge's Decision's conclusions to the contrary were clearly erroneous, and should have been thoughtfully considered, and then vacated, by the Board.

Furthermore, despite the compelling evidentiary record to the contrary, the Board did nothing to correct the Judge's flawed finding that the Respondent made the profit-sharing payments to employees, and thus was responsible for allegedly reducing the amount of the payments received by employees in June of 2019. ALJ Decision 3, 6, 27. Once more, the Judge's finding is almost entirely reliant upon his findings as related to the alleged § 8(a)(1) violation, and his drawing of adverse inferences against the Respondent, which – as explained above – were in

[19] The record is quite clear that the Respondent's involvement in the profit-sharing plan is limited to the administrative task of reviewing the list of employees provided by the corporate office to ensure that all eligible employees were listed, and any ineligible or former employees' names were struck. (Tr. 425) The Respondent's *de minimis* involvement thus did not support the Judge's finding of control. The Judge's finding that the Respondent analyzed employees' earnings, hours of work, and seniority to determine payment amounts (ALJ Decision 6) is clearly contradicted by Zilbauer's testimony, wherein he explained that he merely confirmed that the salary information and dates of employment, as considered by Cascades, Inc. and provided to him for review, were reflected accurately - in sum, wholly ministerial duties. (Tr. 425)

and of themselves improper. [20] Not only were the alleged § 8(a)(1) statements disputed and unproven, but even if true, the statements in no way attributed control over the profit-sharing formula or payments to the Respondent, rather than Cascades, Inc. Had the Board considered the Judge's findings, in light of the evidentiary record, the Board would have – and should have – vacated the Judge's Decision on these grounds.

Finally, as a related and particularly important matter meriting reconsideration, the Board's Order mandates that the Respondent "rescind the unlawful changes to the manner in which we calculate profit sharing plan payments to [the Employees]". The precise provisions of the Board's Order which are directly implicated and inherently vitiated by the fact that the Respondent lacks any capacity to effectuate the Board's directive that the *status quo ante* be restored, are as follows:

> "The National Labor Relations Board orders that the Respondent, Cascades Containerboard Packaging – Niagara, a Division of Cascades Holding US Inc., Niagara Falls, New York, its officers, agents, successors, and assigns, shall
>
> 1. Cease and desist from
>
> (c) Changing how it calculates unit employees' profit-sharing plan payments or reducing the amount of those payments . . .
>
> (d) . . . unilaterally changing how it calculates unit employees' profit-sharing plan payments or reducing the amount of those payments.
>
> 2. Take the following affirmative action necessary to effectuate the policies of the Act.
>
> (c) Make affected unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful changes to their profit-sharing plan calculations and payments . . .

[20] The Judge's own Decision undercuts the Judge's claim, inasmuch as the Decision claims that, to the extent the General Counsel did not make out its case, it was due to the Respondent's failure to respond to the General Counsel's subpoena, illustrating the Judge's inherent (and incorrect) reliance upon the adverse inferences he had drawn. See ALJ Decision 17.

(h) Restore the unit employees' terms and conditions of employment to the status quo before the unlawful unilateral changes were made." NLRB Decision 3-4.

As the Respondent pointed out in its Exceptions, the Respondent cannot possibly comply with the foregoing mandate because, as is irrefutably demonstrated in the record developed before the Judge, the Profit-Sharing Plan which is the subject of the Complaint and the Judge's Decision, is not the *Respondent's* profit-sharing plan – it is the profit-sharing plan of Cascades, Inc. - and the Respondent lacks any authority or responsibility to control the Profit-Sharing Plan. The Respondent once again respectfully submits that it does not have the authority to "calculate payments" or "make changes to" the profit-sharing plan, and lacks any ability to "restore the status quo"

Despite the Respondent's efforts to repeatedly illustrate to the General Counsel and the Judge that the Respondent was the wrong party insofar as control over the profit-sharing plan is concerned, the case proceeded in total disregard of the Respondent's admonitions, and is presently on a track where (assuming, *arguendo,* that the Board's Order ultimately remains intact following any Court of Appeals review) the task of identifying which entity truly has the capacity to restore the *status quo ante* effectively has been relegated to a compliance procedure . Since, as Counsel for the Respondent forewarned (See: Respondent's Amended Answer, Post-Hearing Brief to the Judge, and Respondent's Exceptions, as well as Tr. 266: "[T]he defined Respondent in this case **has absolutely nothing to do with this profit-sharing plan** [...] **They have no involvement in the administration and perpetuation of this profit-sharing plan**[.] [The General Counsel] **has to at least identify the right legal entity** that had responsibility for and control over the plan [...] **and they have failed to do that here**[.]"), the Board was prosecuting a party which possessed **no control** over profit-sharing plan decision-making – to wit, the Respondent – it is difficult, if not impossible, to foresee how the remedy being directed by the Judge and now the Board can be

achieved without ultimate resort to considerations of contempt and, even then, it will merely be confirmed that Respondent is powerless to satisfy this element of the Board's Order. Stated somewhat differently, the Respondent simply does not have the power, legally or practically, to change the profit-sharing plan in any respect, and no amount of directing it to do so will install the requisite, lacking authority upon the Respondent. Candidly, the Respondent does not have the capacity to comply with the directives dictated in the Board's Order to reverse or effectuate "changes" to the profit-sharing plan in restoring the status quo.

This conundrum is not of the Respondent's making. Thus, the Respondent disclosed to the General Counsel from the very inception, when an Administrative Subpoena *Duces Tecum* had been served in connection with the investigation of the profit-sharing allegations, that Respondent lacked control over the profit-sharing plan. The Respondent affirmed this inescapable fact of the matter in its Answer to the Complaint in this case, and spoke to it during the Trial before the Judge, let alone in its various Briefs and in the Exceptions. No one associated with the Board has listened and now the Respondent faces the dilemma described above, which was easily avoidable had the General Counsel proceeded otherwise.

In a manner of speaking, the Board is now ordering that the Respondent be punished for something which may or may not have been done by another legal entity (to wit, the legal entity responsible for the profit-sharing plan) by being forced to pay compensation to its employees, the amount of which is incalculable, because the Respondent has no authority over or access to the pertinent internal workings of the profit-sharing plan. These facts provide compelling grounds for the Board's reconsideration of the Board's Decision and Order.

c. If the Board Does Not Reverse its Decision, It Must Remand the Case on the Subject of Control Over the Profit-Sharing Plan

If the Board does not reconsider its Decision and reverse the Judge's Decision on the basis of the General Counsel's failure to prove that the Respondent controlled the profit-sharing plan and any alleged changes thereto, then the Board must at the very least remand the case to the Judge for further proceedings, so that an evidentiary record on the subject of control of the profit-sharing plan can be established with the burden properly resting with the General Counsel as a *prima facie* matter. As explained throughout the instant Motion for Reconsideration, there is a complete dearth of evidence on the subject of control of the profit-sharing plan. This results from the General Counsel's failure to meet its burden to prove that Respondent had any control over the profit-sharing plan. Rather than acknowledge that the General Counsel did not meet its burden, the Judge and the Board have instead shifted the burden to the Respondent to prove a *lack* of control. This burden was wrongfully imposed upon the Respondent in contravention of Board law and without any notice to Respondent.

Accordingly, even if the decision to shift the burden was one that the Judge was empowered to make (it is not), then the Respondent was entitled to notice and an opportunity to gather and present evidence that would serve to establish that it had no control over the profit-sharing plan, and that the plan was instead wholly controlled by Cascades, Inc. Because the Respondent had no advance notice that it would be tasked with this responsibility, the record that was created before the Judge does not represent anything resembling the complete set of facts and evidence that the Respondent could summon – with proper notice and time to prepare – on the subject of the corporate control of the profit-sharing plan. Accordingly, if the Board will not reverse its decision to shoulder the Respondent with the burden on the subject of corporate control, it must at the very least provide the Respondent a fair opportunity to establish a complete record on the subject.

Accordingly, if the Board does not reverse its Decision, it must remand the case to the Judge for further proceedings on the subject of control over the profit-sharing plan.

d. The Board Did Not Address Arguments That Profit Sharing Was a Gift

Finally, the Board erred by wordlessly affirming the Judge's rejection of the Respondent's argument that the profit-sharing plan payments received by employees were a gift from Cascades, Inc., and thus were not a subject concerning which the Union was entitled to bargain on behalf of employees. ALJ Decision 26. The Employer's handbook identifies the profit sharing program as a "non-negotiable [...] discretionary corporate program which can be modified or reviewed at any time by the Company." At the hearing, Pozzobon, Laporte and Zilbauer all described the profit sharing as a "gift" that is not guaranteed. They further testified that when employees are on-boarded, and twice every year when employees are given their profit share, they are advised that the profit sharing program is a Cascades, Inc. program that the Employer cannot control, and is a gift to employees. Despite this evidentiary record, the Judge found that the profit-sharing payments were not a gift, based primarily on the Judge's rationale findings that the payments could not be gifts because they were "not *de minimis*" and were based upon "employment-related factors". ALJ Decision 26. The Board undertook no independent analysis of the Respondent's arguments, despite the lack of record support for the Judge's conclusions.

The Judge's assertion that, because the profit-sharing plan payments were not *de minimis* they could not qualify as a gift, absent other indicia the payments were not gifts, is not supported by Board precedent, which the Board should have considered upon its review. See, *e.g.*, Bob's Tires, 368 NLRB No. 33 (2019). Furthermore, the "employment-related factors" relied upon by the Judge were all derived from the Judge's erroneous finding that the Respondent determined the amount of each employee's payment on the basis of their salary, which in turn took into

consideration their hours of work and their seniority. ALJ Decision 26. This finding appears to be based primarily upon a misinterpretation of Zilbauer's testimony, wherein he stated that he confirmed that salary information provided to him by the corporate office was accurate. (Tr. 425) Not only does Zilbauer's testimony *not* prove that employees' salaries factored into the formula employed by Cascades, Inc. to determine each employees' profit-sharing payment, but furthermore, the testimony certainly does not prove that employees' salaries reflected their hours of work or seniority with any precision or constancy, so as to render those factors additional factors that would have been considered by the corporate office simply by dint of any consideration given to each employee's salary. Despite the Respondent having set forth this error in its Exceptions, the Board undertook no effort to correct the record in its Decision and Order.

Finally, black letter Board law holds that an employer cannot unilaterally change a "term and condition of employment" in effect as of the date of a union's certification; rather, the employer must maintain all benefits, unchanged, and negotiate with the union to the point of agreement or impasse before modifying a prevailing "term and condition of employment". The Board failed to recognize the import of this black letter law in the case at bar. The record developed before the Judge established that, as of May 6, 2019, the date of the Union's Certification, the profit-sharing plan which is the subject of the Judge's Decision constituted a "gift". The Union (by the underlying Charge), the General Counsel (through the issuance of the Second Consolidated Complaint), the Judge (in his Decision), and now the Board (in its Decision) seek to unilaterally divine that what was irrefutably proven a gift as of 11:59 P.M. on the eve of the Union's Certification, was transformed into a "term and condition of employment" as of midnight on May 6, 2019, the date of the Union's Certification.

More specifically, the record was barren of any direct evidence that the profit-sharing plan was anything other than a "gift" when the Union's Certification was issued on May 6, 2019, and – in light of that fact - there is no Board precedent which requires that Cascades begin to treat the distribution of the profits in June of 2019 as a "term and condition of employment" purely as a consequence of the Union's Certification. In fact, as a related matter, Board law also precludes an employer from granting "new" benefits to employees without first negotiating with a newly-certified labor organization. According to this authority, if it is assumed that the record establishes (as it does) that as of the Union's Certification, the profit-sharing plan was a "gift" and not a "term and condition of employment", then it would have been unlawful for Cascades to unilaterally commence affording the employees the benefits of the profit-sharing plan as a "term and condition of employment" as the Judge, and now the Board, suggest it must. Moreover, § 8(d) of the Act provides that Cascades' bargaining obligation arising from the Union's Certification cannot " . . . compel [Cascades] to agree to a proposal or require the making of a concession . . . " in negotiating with the Union. Contrary to this requirement, the remedy ordered by the Board would do precisely what the statute proscribes. In other words, the Board lacks the statutory authority to require Cascades to accept the proposal submitted by the Union as a part of its Initial Proposals on September 18, 2019, to include the profit-sharing plan as a "term and condition of employment" in an initial collective bargaining agreement. Given this inherent contradiction, the Board must reconsider its Decision and Order.

V. The Board Erred by Finding that the Alleged Alterations to the Profit-Sharing Plan Violated § 8(a)(3) of the Act

The Board next erred by finding that alleged alterations to the profit-sharing plan, found to have been made by the Respondent, were made in violation of § 8(a)(3) of the Act. ALJ Decision 28. As a preliminary matter, if it were not for the prior erroneous findings that a change was made

to the profit-sharing plan, the Board's failure to draw a distinction between the Respondent and Cascades, Inc., and Board's silent affirmance of the Judge's erroneous finding that the Respondent was responsible for the change, - the Board would have never reached the question of whether the alleged change violated § 8(a)(3) of the Act. Specifically, the erroneous finding that the Respondent controlled the profit-sharing plan and payments to employees is a necessary underpinning to the finding that the Respondent was motivated by anti-Union animus. In reality, as proven by an objective review of the evidentiary record, it was Cascades, Inc., rather than the Respondent, who controlled the profit-sharing plan and payments to employees – and there is absolutely no evidence to support the assertion that, if Cascades, Inc. had been proven to have made any changes to the profit-sharing plan, those changes were motivated by anti-Union animus.

However, the Board's Decision was, in the case of this particular allegation, even more deficient than the Judge's Decision, inasmuch as the Board rejected the Judge's proper application of the Wright Line test, finding instead that motive was "not disputed" but rather was proven by "direct evidence establish[ing] that the Respondent reduced the payments because of 'the union situation'". NLRB Decision 1, FN 1. The Board further claimed that the Respondent had failed to state any other reason for "the reduction". Id. The Board's conclusions illustrate that the Board entirely failed to grasp or wrestle with certain integral arguments made by the Respondent. As stated in connection with the Respondent's unreviewed arguments concerning the finding that Pozzobon's statements violated § 8(a)(1) of the Act, the alleged quote cited by the Board is contradicted by ample record evidence. However, perhaps more concerning is the Board's further attribution of Pozzobon's alleged statement to the Respondent – particularly in circumstances where ample record evidence establishes that the Respondent was not even the party responsible for administering the profit-sharing plan. Similarly, the Board's further reasoning that the

Respondent had failed to state any other reason for the "reduction" misses the mark in two key manners. First, it falsely attributes control of the profit-sharing plan to the Respondent. Second, it assumes there was a "reduction" of some sort in profit-sharing payments – a fact never established by the General Counsel. Because the Board's conclusions illustrate material error, the Board thus has even more reason to reconsider its Decision and Order.

VI. Neither the Record Nor Precedent Support the Finding that the Refusal to Provide Information to the Union Violated §§ 8(a)(5) and (1) of the Act

By extension of his prior erroneous conclusions, the Judge's finding that the Respondent violated the Act by failing to respond to the Union's request for information regarding the profit-sharing plan and profit-sharing plan payments should also have failed before the Board. The Judge's argument rested entirely upon his earlier finding that the profit-sharing plan was a term and condition of employment (ALJ Decision 31), which – as explained above – is proven demonstrably false by the evidentiary record. Furthermore, the Judge's Decision, and the Board's Decision in turn, both neglected to address, in any way whatsoever, the Respondent's arguments that the Union's requests were not relevant, given that the Union was able to proceed in bargaining and make a proposal regarding the profit-sharing plan without the requested information. See (Tr. 82, 428); G.C. Ex. 3; R. Ex. 8. Given these failures, the Board should reconsider its Decision and Order, and upon reconsideration, the Judge's Decision concerning the profit-sharing request for information should be reversed.

VII. Neither the Record Nor Precedent Support the Finding that the Decision to Stop Posting Facility Profits Violated § 8(a)(3) of the Act

Similarly unsupported is the Judge's holding that the Respondent violated § 8(a)(3) of the Act by ceasing to post the facility's profits at the facility. ALJ Decision 28. The Judge's findings and conclusions are – once again - not discussed at all substantively by the Board's Decision. The

Judge's conclusion was itself based upon multiple unsupported factual and legal findings, in combination with the Judge's inexplicable rejection of the unrebutted testimony offered by Laporte. See ALJ Decision 10-11 (Discrediting Laporte and holding him to an unforgiving standard with regard to instances of confusion he expressed during his testimony.) First, the Judge erroneously found that the Respondent, rather than Cascades, Inc., made the determination that the facility would stop posting profits. ALJ Decision 10. Contrary to the Judge's Decision, the decision to post profits was not made by the Respondent. Rather, the record clearly demonstrates that Cascades, Inc. made the decision to stop posting profits only after a malicious flyer about Laporte was circulated by the Union at the facility; and that the company's decision was announced to employees in an explanatory memorandum before it went into effect. (Tr. 352-353); R. Ex. 5. Furthermore, contrary to the Judge's claims, the memorandum clearly establishes that the decision to cease sharing profit information was connected to the flyer about Laporte, rather than the Union election. Given this evidentiary record, the Judge's Decision merited much closer consideration by the Board than it received, and for this reason the Board should reconsider its Decision and Order.

Second, even assuming *arguendo* that the Respondent was responsible for the decision to cease sharing profit information, as explained above, the Board erred by affirming the Judge's finding that the General Counsel met its burden to establish animus on the part of the Respondent. The Judge incorrectly concluded that the memorandum sent to employees established a nexus between the Respondent's alleged animus and the decision to cease sharing profit information. ALJ Decision 28. A review of the memorandum in question establishes that it does no such thing. First, the Judge found in his Decision that the author of the memorandum was unclear (Decision 10), and thus the Judge cannot base his finding on the premise that the Respondent wrote the flyer,

or that the Respondent connected the decision to cease sharing profit information with the Union election by way of the flyer. However, even if the Judge had found that the Respondent authored the memorandum, the document itself speaks to respecting the outcome of the election, and explicitly ties the decision not to share profit information to the *Union's* personal attack on Laporte. R. Ex. 5. Thus, not only does the memorandum distributed to employees not support the Judge's finding of animus, but in fact actively contradicts it – facts that all merit further, particularized consideration by the Board.

Because the General Counsel did not meet its burden under Wright Line, the burden should have never been shifted to the Respondent, for the Respondent to prove that it would have stopped sharing profit information regardless of employees' support for the Union. In any event, however, the record establishes conclusively that employees' support or non-support of the Union had absolutely nothing to do with the decision that was reached to stop posting profit information. Instead, the record clearly establishes that the decision had *everything* to do with the uncalled for, false, and deeply personal attack levied against Laporte by the Union. As was conclusively laid forth by Laporte's testimony, the flyer was significantly damaging and threatening to Laporte. Specifically, the flyer implied that Laporte had falsified his resume; and disclosed his personal address, information about his personal finances, and the name of his wife. (Tr. 345, 349-351); R. Ex. 6. In fact, Laporte became so sincerely emotional during his testimony about the flyer and its effect on him, that the Judge had to adjourn the Hearing for several minutes to allow Laporte to regain his composure. (Tr. 346-347) Given this incontrovertible evidentiary record, the Board must reconsider its conclusions in support of the Judge's Decision. [21]

[21] As a related matter, the Board should reconsider the Judge's repeated application of the standards for employee speech to an alleged change which the record clearly proves was not made on the basis of any employees' protected, concerted activity. See ALJ Decision 29; ALJ Decision29, FN

VII. The Board Erred by Finding that the Layoffs Violated §§ 8(a)(5) and (1) of the Act

The Board must next reconsider its finding that the Respondent violated the Act by failing to provide notice and an opportunity to bargain to the Union before conducting temporary layoffs in May 2019. NLRB Decision 1, FN 1; ALJ Decision 23. The Board affirmed the Judge's finding that the Respondent presented the Union with a *fait accompli,* relying upon the "totality of the circumstances", but also the fact that the Respondent had proceeded with a second round of layoffs after receiving the Union's demand to bargain. NLRB Decision 1, FN 1. The Board additionally opined that, under different circumstances, six days' notice of the layoffs might have been sufficient, but was insufficient in this case because the Union was "recently certified" and the Union had to take measures to determine whether the layoff constituted a past practice. Id.

In so holding, the Board rejects without discussion the Respondent's assertion that the Union had waived its right to bargain over the temporary layoffs by failing to respond to the Respondent in a timely manner, and failed to make itself available until well after the planned layoffs were tentatively scheduled to be conducted. Additionally, the Board's conclusion that the Respondent's notice was not sufficiently timely [22] is not supported by the record or the Board's precedent. To the contrary, the record demonstrates that the Respondent's notice provided the Union with ample time to respond electronically, and moreover, that it was the Union who chose

28. Contrary to the Judge's implication, the Respondent never asserted that the flyer was made or distributed by an employee, but has always asserted that the flyer was created and distributed by the Union. The standards for employee speech explored by the Judge's Decision are thus not applicable, and should have been rejected by the Board.

[22] The Judge's peculiar assertion, repeated by the Board, that the Respondent was obligated to provide the Union with more notice than is required in a typical case because the Union was newly certified (ALJ Decision 22; NLRB Decision 1, FN 1) is unsupported by both with any precedent whatsoever.

to wait and respond to the Respondent by regular mail. Furthermore, the record illustrates that the notice provided sufficient detail concerning when the layoff would occur to "get the ball rolling", allowing the parties to meet and bargain the details, and the Union to request any more specific information it deemed necessary to bargain. For all these reasons, it is clear that the Board's conclusions as to the layoffs merit additional consideration by the Board.

VIII. Neither the Record Nor Precedent Support the Board's Affirmance of the Judge's Finding that the Subcontracting of Janitorial Work Violated §§ 8(a)(5) and (1) of the Act

Finally, the Judge erred by finding that the Respondent's decision to use an independent contractor to clean the mill after Jackson retired, without first providing the Union notice and an opportunity to bargain, violated the Act, and the Board took no action in its Decision and Order to correct this error. ALJ Decision 25. The Judge's conclusion was based upon his having misconstrued the factual record, and rejected longstanding Board precedent. First, the Judge failed to recognize the historical interchange between the independent contractors, who the Respondent utilized to clean the facility alongside Jackson, and Jackson himself. The Judge distinguished the work performed by the independent contractors from that performed by Jackson by relying upon record evidence that Jackson typically cleaned the production area, and the independent contractors typically cleaned the administrative offices. Decision 3, 18. In so doing, however, the Judge ignored evidence that, historically, the independent contractors routinely cleaned the production area of the mill in Jackson's absence. See (Tr. 369-372, 409-410); G.C. Ex. 14. This evidence illustrated that the Respondent had historically used independent contractors to clean throughout the facility, [23] and thus that the Respondent's use of an independent contractor after

[23] The Judge also incorrectly found that the Respondent's use of independent contractors after Jackson's retirement constituted a "substantial expansion" of the Respondent's use of independent contractors. (Decision 24) This finding is unsupported by the record, which

Jackson's retirement did not constitute a "change" concerning which the Respondent was obligated to bargain, as asserted by the Judge (Decision 23, 24). This error, readily ascertainable upon review of the evidentiary record, has not been addressed in any substance by the Board, and therefore merits further consideration by the Board.

Furthermore, the Board did not contend with the fact that, even if the Respondent's use of an independent contractor had constituted a change, Board precedent illustrates that it was not a change concerning which the Respondent was obligated to bargain. See First Nat. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (An employer has no obligation to bargain over "a change in the scope and direction of the enterprise".) In response to the Respondent's arguments pursuant to First National Maintenance, the Judge asserted that the Respondent continued to run the same business after Jackson's retirement, and that the performance of custodial services did not go to the "heart" of the Respondent's business. ALJ Decision 24. Though the change involved only one position, the Respondent argued that it represented a fundamental change in the services rendered by the Respondent's work force, and thus a change in the scope and direction of the Respondent's enterprise. By opting not to fill the Janitor position, the Respondent was shutting down the entire line of janitorial services which it had previously deployed. Furthermore, First National Maintenance does not support the Judge's conclusion that factors such as allocation of capital, or how "central" a service line was to an employer's business control the analysis, and the Judge cited no applicable precedent for his reliance upon such factors. See ALJ Decision 24. None of these arguments were addressed by the Board's Decision and Order, rendering it woefully inadequate and ripe for further consideration by the Board.

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illustrates that only one person was required to complete the custodial work previously performed by Jackson.

Finally, the Board erred by failing to analyze the Respondent's arguments concerning the Union's refusal to bargain with the Respondent regarding the custodial work previously performed by Jackson. ALJ Decision 25. In circumstances where a party has made clear that they have made up their mind concerning a subject, that they have no intention of engaging in meaningful bargaining, and that bargaining will be futile since the party's position constitutes a *fait accompli*, that party's position is "inconsistent with the duty to bargain". Brannan Sand & Gravel Co., 314 NLRB 282 (1994); Ciba-Geigy Pharmaceuticals, 264 NLRB 1013 (1982). Contrary to the Judge's finding (ALJ Decision 19), both the evidence and Warner's testimony made clear that the Union would never accept any resolution other than the Respondent filling Jackson's position, regardless of whether the Respondent restored the status quo ante. See G.C. Exs. 10, 11, 12, 13, 14; (Tr. 101, 103). Accordingly, given the record, it was clear that, regardless of whether the Respondent restored the status quo ante, the Union would never agree to bargain in good faith. Under such circumstances, the Board should not have summarily affirmed the Judge's conclusion that the Respondent was obligated to restore the status quo ante in order to bargain with the Union, when the Union made clear it would not engage in good faith. This thus serves as yet another basis in support of the Respondent's Motion for Reconsideration.

CONCLUSION

For all the reasons set forth above, the Respondent respectfully requests that the Board reconsider its Decision and Order, reverse the Judge's Decision as detailed above, and dismiss the underlying Second Consolidated Complaint in its entirety.

Respectfully Submitted,

___/s/_____

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD PACKAGING - NIAGARA, A DIVISION OF CASCADES HOLDING US, INC.	:	Case No.	03-CA-242367 03-CA-243854 03-CA-248951
and	:		
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 65, AFL-CIO	:		

CERTIFICATE OF SERVICE

The Undersigned, Don T. Carmody, Esq., being an attorney duly admitted to the practice of law, do hereby certify, pursuant to 28 U.S.C. § 1746, that I e-filed, on March 22, 2021, on behalf of Cascades Containerboard Packaging – Niagara, a Division of Cascades Holding US, Inc. (Respondent"), the original of "Respondent's Motion for Reconsideration of Board's Decision and Order" ("Respondent's Motion for Reconsideration") *via* the National Labor Relations Board website, www.nlrb.gov, with the following:

Hon. Roxanne L. Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570

As an attorney duly admitted to the practice of law, I do hereby further certify, pursuant to 28 U.S.C. § 1746, that I e-filed a copy of the Respondent's Motion for Reconsideration with the following *via* the National Labor Relations Board's website, www.nlrb.gov, on March 22, 2021:

Hon. Paul J. Murphy, Regional Director,
Acting Counsel for the General Counsel
National Labor Relations Board, Region 3
130 South Elmwood Avenue
Suite 630
Buffalo, New York 14202-2465

As an attorney duly admitted to the practice of law, I do hereby further certify, pursuant to 28 U.S.C. § 1746, that I e-mailed a copy of the Motion for Reconsideration to the following on March 22, 2021:

Nicholas A. Scotto, Special Representative
26 Court Street
Suite 1710
Brooklyn, New York 11242
nscotto@iamaw.org

Dated: March 22, 2021
Katonah, NY

Respectfully Submitted,

____/s/_____

Don T. Carmody
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